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The surveys made by the Government were under authority of Acts of Congress passed May 18, 1796, (1 U. S. St. at L., 464) and February 11, 1805, (2 U. S. St. at L., 313), and plaintiff's title was acquired thereunder.

In 1820 the lands now owned by plaintiff were part of the public domain of the United States, in which year they were surveyed by Sylvanus Bourne, Government Engineer, who, in compliance with the provisions of said acts, noted in his field notes the location of Sandusky River and Muddy Creek, surveyed and meandered said watercourses, described the sections and fractional sections bordering thereon, made a plat of said lands and waters, copies of which plats and field notes have been for many years on file in the offices of the surveyors of Ottawa and Sandusky counties, Ohio.

At the time of the survey and sale, much of the land was described by said surveyor in his notes as marsh land, which has since become submerged by the action of the waters, but in most part this marsh land is still traceable by lowland and aquatic vegetation.

The Act of 1796 provides for the survey of the territory and sale of the lands. The Act of 1805 relates to the mode of surveying public lands. The former requires the surveyor to note in his field books the true situations of all *watercourses*, which books are to be returned to the Surveyor General, who is directed to cause a description to be made of the lands surveyed, which is to be transmitted to the Government officers who have superintendence of the sales. It is also provided in Section 9:

> " And be it further enacted that all navigable rivers within " the territory to be disposed of by virtue of this act, shall be " deemed to be and remain public highways. And that in all " cases, where the opposite banks of any stream, not navigable, " shall belong to different persons, the stream and the bed thereof " shall become common to both."

In the Government survey, the mouths of the Sandusky River were found, determined and fixed by the surveyor. The mouth of Muddy Creek was likewise located and fixed. Some of the lands in question bordering upon these streams were subsequently sold by the Government to plaintiff and its predecessors in title. Those lands remaining unsold and unfit for cultivation at the time of the passage of what is known as the "Swamp Lands Act," passed by Congress, September 28, 1850, (9 U. S. St. at L., 519), were ceded to the State of Ohio, and by the State conveyed to plaintiff and its predecessors in title according to the description furnished by the Secretary of the Interior to the Governor of the State.

The Circuit Court of Ottawa county was the trial court. In compliance with the statutes of Ohio, it made separate findings of fact and conclusions of law, and these were duly embodied in its decree.

As facts it found the waters those of river and creek, as surveyed by the Government Engineer, and as plaintiff contends. *As conclusions of law,* it determined said waters were a public bay, as defendants contend. The contradiction was due to the fact that the Government sur-

veys, which were part of the evidence, show, and every witness examined upon the subject, both for plaintiff and defendants, testified that said waters are of river and creek, and in making its findings of fact the court was bound by the evidence. In making its conclusions of law, the court considered itself bound by a previous decision of the Supreme Court in another case, in which it found, as *matter of law*, without any evidence before it, said waters to be those of a public bay.

It was and is conceded that in 1828 the Supreme Court of Ohio declared that owners of lands upon both banks of Sandusky River own to the middle of the river, subject only to the easement of the public for purposes of navigation, and such owners are entitled to the exclusive right of fishing in said river and in all navigable rivers within the State. This has been a rule of property in Ohio since that time.

Section 9 of the Act of Congress of May 18, 1796, also provided that all non-navigable streams and the beds thereof should belong to the owners of the banks. The uncontradicted evidence shows that Muddy Creek is not a navigable stream and never was.

A copy of a plat of the *locus in quo* is attached to this brief. The location of Sandusky Bay will be noted, and also of Eagle Island, which now contains about three acres but at the time of the Government survey in 1820 contained one hundred and thirty-five (135) acres.

Plaintiff claims ownership of all the lands lying west of a line drawn from Slate's Point on the north to the east end of Eagle Island, thence southerly to South Point.

The north and south channels of Sandusky River will be noted, one emptying into Sandusky River north and the other south of Eagle Island. The river is navigable for twenty-five miles from the east end of Eagle Island.

These two channels were meandered by the Government surveyor as Sandusky River in 1820, and the mouths of the river there located and fixed. The north channel is that used by vessels engaged in navigation. In 1866 the river was again surveyed by the Government, a copy of which survey is attached to the record.

Proceeding westerly, it will be observed that Muddy (Mud) Creek empties into Sandusky River between Winous Point and what is known as the "Middle Ground." There the Government located its mouth in 1820.

Plaintiff contended that these watercourses are as located and meandered by the Government and their location cannot be changed by the State either by legislation or judicial decree.

Defendants contend that the waters are of Mud Creek Bay, which is connected with Sandusky Bay and Lake Erie (Amended Answer, Rec. p. 9). It will be noted that the amended answer is not definite as to extent. The original answer, which is part of the record, is more definite, (Rec. p. 328), viz:

They deny that Sandusky River empties into Sandusky Bay and say that it empties into Mud Creek Bay at or near Squaw Island.

They deny that Mud Creek empties into Sandusky River.

They aver that Mud Creek Bay is about four (4) miles long east and west, and from one-half to two and one-half miles wide north and south, and is the western continuation of Sandusky Bay.

Taking the section lines for measurement, it is apparent that defendants claim that to be Mud Creek Bay from Eagle Island on the east to the westerly limits of plaintiff's property, that is, from Eagle Island on the east to Horse Shoe Island on the west, as shown on plat hereto attached, and from Squaw Island north to the dry land.

II.

ASSIGNMENT OF ERRORS.

1. That the Government survey of 1820 is binding upon the courts of Ohio, and the Supreme Court of Ohio erred in determining that Sandusky River and Muddy Creek are not situate and located as determined and declared by the United States in said survey, field notes and plats.

2. That the court erred in denying the title of plaintiff so acquired under and by virtue of Acts of Congress of May 18, 1796, and February 11, 1805, and September 28, 1850, to property bordering upon Sandusky River and Muddy Creek.

3. That the court erred in deciding that said waters were not of Sandusky River and Muddy Creek, but parts of a public bay in which defendants as members of the public have the right of fishing, because by said judgment plaintiff is deprived of its property without due process of law or just compensation, as guaranteed by the Constitution of the United States.

III.

THE JURISDICTION OF THIS COURT.

The question of the jurisdiction of this court to review the judgment of a State court has been raised so often, we may be pardoned for anticipating that it may be made here.

We appreciate that to confer jurisdiction the claim of federal rights must appear on the face of the record, in the pleadings or from the evidence or in the instructions asked for or from exceptions taken to the rulings of the court.

Parmelee v. Lawrence, 11 Wall., 38.

It is not necessary that the claim of federal rights be pleaded, if the record disclose that such claim was made.

Railroad v. Richmond, 15 Wall., 3.

Pennywit v. Eaton, 15 Wall., 380.

> "No particular form of words or phrases in which a claim "of federal rights must be asserted in a State court has ever "been declared necessary by this court; but it is sufficient, if it "appears from the record that such rights were specially set up

"or claimed there in such way as to bring the subject to the "attention of the State court."

Canal Co. v. Paper Co., 172 U. S., 58.
Armstrong v. Treasurer, 16 Pet., 281.
Murray v. Charleston, 96 U. S., 432.
Insurance Co. v. Needles, 113 U. S., 574.
Eureka Lake Co. v. Yuba County, 116 U. S., 410.
Railroad Co. v. Homestead Co., 123 U. S., 552.
Railroad Co. v. Chicago, 166 U. S., 226.

As was said in *Sayward v. Denny*, 158 U. S., p. 184:

"The right on which the party relies must have been called "to the attention of the court in some proper way, and the de- "cision of the court must have been against the right claimed."

The action was commenced in the Court of Common Pleas and appealed to the Circuit Court, where under the practice in Ohio there was a trial *de novo* upon the original pleadings. The Circuit Court was, therefore, the trial court.

That the questions presented to this court were properly raised in that court appears not only in the evidence but in the findings of that court, made under the practice in Ohio.

It will be noted that particular reference is made in the findings to the source of plaintiff's title, to the Acts of Congress under which it was acquired and to the surveys made by the Government under which it patented the lands, and that copies of the plats and field notes of the Government survey are specially made part of the findings of fact of the Court.

The Circuit Court found:

That plaintiff for many years prior to the commencement of the action was

"in actual possession of so much of the lands, marshes and "shores described in the petition (except Section thirty-five) as "described and comprised in the sections and fractional sections "described in the survey and map made by Sylvanus Bourne." (Rec. p. 28).

"That under and by virtue of authority of an act of Con- "gress passed March 18, 1796, providing for the sale of lands "of the United States, in the territory northwest of the Ohio "River, and of an act supplemental thereto, a survey was made "by Sylvanus Bourne, Government Engineer, in 1820, of the "lands and marshes described in said fractional sections, but "meandered the shore line of said waters, and divided said "marshes and lands into townships and sections in conformance "with the directions prescribed in said act. Said surveyor noted "in his field book the situation of all watercourses within said "territory, and also the quantity of the lands, and, in further "compliance with said act, a plat was made of all said lands and "watercourses and waters, and a copy of said plat is on file in "the offices of the county surveyors of Sandusky and Ottawa "counties, Ohio, copies of which were introduced in evidence,

" and, with the field notes accompanying the same, are attached " to the bill of exceptions herein and by reference are made part " of this finding of facts. It is found that said surveyor in 1820 " meandered Sandusky Bay and the other waters within the lines " of said sections and fractional sections, along the shores and " banks of the same, and gave courses and distances and certain " monuments, all of which are shown by the field notes attached " to said plat, and described said waters in his field notes as " Muddy Creek" and Sandusky River. From said plat and field " notes it appears that said surveyor determined the number of " acres of land in the fractional sections bordering upon said " waters, and did not include the lands under the waters in his " computation and statement of the lands in said sections and " fractional sections described in such survey and plat. That " much of said property so surveyed in said fractional sections " aforesaid is now submerged and overflowed land, and much " was marsh land at the time of said survey and was acquired " from the State of Ohio directly or indirectly through plaintiff's " grantors and predecessors in title under what is known as the " swamp land acts. The other lands, i. e., those not granted by " the State as swamp lands, were patented by the Government to " plaintiff's predecessors in title." (Rec. 29-30).

It will also be noted (Rec. p. 33) that in describing "Mud Creek Bay" reference is made to the Government survey of 1820, and to the survey of Muddy Creek.

Again reference is made to the survey in its finding of the location of Sandusky River. (Rec. pp. 40-41).

Again, in locating Eagle Island (Rec. p. 31):

" 'Eagle Island' is situated in Section 24, and is entirely " surrounded by water, and, as surveyed by the United States " Government in 1820, contained about 135 acres, but the island " has been washed away and now contains about three acres, and " is situated near the center of the south half of said Section 24. " The part of said 135 acres submerged is traceable by aquatic " vegetation."

Again, in locating "Horse Shoe Island" at the westerly limits of what defendants claim to be "Mud Creek Bay," (Rec. p. 30),

" 'Horse Shoe Island' is situated in the southeast " quarter of section 20, lying west of section 21, and is surround- " ed by water. The territory now known as 'Horse Shoe Island' " was not shown or designated on the plat and survey of Syl- " vanus Bourne made in 1820, as an island."

Also reference is made to the survey and map in the finding of the location of the "Middle Ground" at which place plaintiff claims Muddy Creek empties into Sandusky River. (Rec. p. 32).

These places were those which marked the location of river and creek as fixed by the Government survey upon which plaintiff relied, and the findings of the court clearly indicate that the title to these streams which plaintiff asserted came from the Government under Acts

of Congress authorizing the survey and sale of lands was at issue in this action in trial court in the usual and proper way; that the question raised was considered and passed upon by the trial court, whose decision was against the title of plaintiff in the waters and its rights and privileges thereunder, because the waters are not parts of Sandusky River and Muddy Creek, but of a public bay. The case was then taken to the Supreme Court, and in the petition in error it was alleged (Rec. 2) that the judgment was in contravention of the Constitution of the United States in that the private property of the plaintiff was taken for public use without just compensation.

In view of this specification, with the record before it for consideration, we submit that it appears by clear and necessary intendment that the federal question now presented to this court was directly involved so that the State Court knew just what was claimed and could not have given judgment without deciding the question.

Powell v. Brunswick County, 150 U. S., 440.

The certificate of the Supreme Court cannot confer jurisdiction upon this Court, but as the findings of the trial court disclose the contention of plaintiff there, so the certificate (Rec. p. 423) discloses that it was insisted by plaintiff in support of its allegation in the petition in error that "the waters in dispute had been surveyed by the United States as those of Sandusky River and Muddy Creek, and the lands mentioned and described in the case had been surveyed, sold and patented by the United States to plaintiff's predecessors in title as lands bordering upon said river and creek, all of which had been done under authority of Acts of Congress; that plaintiff had and possessed the sole and exclusive right of fishing in said waters; that the judgment and decree of the Circuit Court that said waters are not those of Sandusky River and Muddy Creek, but those of an open public bay, in which the public has the right of fishing, was in contravention of the Constitution of the United States, in that plaintiff was deprived of its private property and the same was taken for public use without just compensation to it; and it became material to the determination of said case in this Court to determine said question so made by plaintiff."

It thus appears from the certificate of the court that it fully comprehended the contention of plaintiff and passed upon the question here presented.

As we have stated, it was not necessary to aver in the pleadings source of title in such case under the State statutes, but the nature, source, existence and validity could be shown by evidence and every claim of right made at the trial. The record shows this was done.

We therefore submit that this Court has jurisdiction.

IV.

TITLE OF PLAINTIFF.

If the waters are those of Sandusky River and Muddy Creek, as surveyed by the United States, then under the many decisions in Ohio

plaintiff is the owner of the lands under those waters and has the exclusive right of fishing therein.

Gavit v. Chambers, 3 Ohio, 496.
Benner v. Platter, 6 Ohio, 505.
Blanchard v. Porter, 11 Ohio, 138.
Lamb v. Rickets, 11 Ohio, 311.
Walker v. Public Works, 16 Ohio, 540.
Hickok v. Hine, 23 O. S., 523.
Niehaus v. Shepherd,, 26 O. S., 40.
June v. Purcell, 36 O. S., 396.
State v. Shannon, 36 O. S., 423.
Day v. Railroad, 44 O. S., 406.
Lembeck v. Nye, 47 O. S., 336.
Railroad Co. v. Platt, 53 O. S., 254.
Pollock v. Shipbuilding Co., 56 O. S., 655.

If the waters are those of a public bay, then plaintiff is not the owner of lands thereunder and the public has the right of fishing therein.

Sloan v. Biemiller, 34 O. S., 492.

This rule of property does not affect the land under Muddy Creek, because the findings of fact disclose that it is not navigable, and under Section 9 of the Act of 1796, cited above, the grant by the Government gave title to the bed of that stream.

The Circuit Court found *as facts* that the waters surveyed by the Government as Sandusky River and Muddy Creek are as surveyed and as claimed by plaintiff. It, however, as *conclusion of law,* decreed them to be those of a public bay.

This contradiction was due to the decision of the Supreme Court in *Bodi v. The Winous Point Shooting Club,* 57 O. S., 226 and 629, in which case the Circuit Court found the waters to be those of river and creek, and enjoined defendants from hunting and fishing. The Supreme Court reversed that judgment as to fishing and affirmed it as to hunting.

In other words, the Supreme Court decided that the public has the right of fishing because the waters are of a public bay; but the public has not the right of hunting because the waters are the private property of plaintiff.

The Circuit Court, therefore, found the facts as the evidence exacted, and followed the Supreme Court in the law, and the case was passed along for the Supreme Court to wrestle with. This it did by affirming the judgment of the Circuit Court without report.

The Circuit Court found *as facts* that Sandusky River and Muddy Creek are situate as the Government engineer determined in 1820; that he noted in his field books the location of river and creek, described the sections and fractional sections, made a plat of the lands and watercourses, copies of which plats have been on file in the offices of the surveyors of Ottawa and Sandusky counties for many years. (Rec. p. 29.)

The evidence further shows that the Government caused another survey to be made of the Sandusky River in 1866, and that its engineers

considered those waters to be Sandusky River which defendant contends are a public bay. (Rec. pp. 308-313.)

It also found (Rec. p. 30) plaintiff to be owner and to have title to the lands upon both banks of Sandusky River and Muddy Creek; that its title came either directly by patent from the United States to itself or predecessors in title, or indirectly from the State of Ohio by virtue of what is known as the Swamp Lands Act, passed by Congress September 28, 1850. (9 U. S. St. at L., p. 519.)

It also found that the surveyor noted the quality of the lands, and that much which is now submerged and overflowed he described as marsh land (Rec. 30); that now dense masses of aquatic and lowland vegetation grow upon land surveyed as marsh land. (Rec. 41.)

It also found that Eagle Island at the time of the Government survey contained 135 acres, but now contains about three acres, the land having been washed away by the action of the waters; that part of the submerged land is still traceable by aquatic vegetation. (Rec. 31.)

It further found that Sandusky River empties into Sandusky Bay through two mouths, separated by Eagle Island, and in its findings describes Sandusky River and located it as surveyed by the Government and as claimed by plaintiff. (Rec. 40-44.)

"Muddy Creek" it finds (Rec. pp. 39-40) has banks well defined until it opens out into a wider expanse of water locally called Mud Creek Bay; that the channel of the creek runs through the so-called bay until it reaches Squaw Island, "where it empties into another channel hereinafter mentioned" (Sandusky River). This conforms to the Government survey and the claims of plaintiff.

"Mud Creek Bay" it finds (Rec. pp. 33-34), "is that body of water lying west of a line drawn from Winous Point to Squaw Island. *"Mud Creek Bay" is a local name given to a portion of the waters of Mud Creek which have spread over, and, together with waters coming from the north and south marshes, have submerged and overflowed the lowlands contiguous to its channel."*

The grants by patent from the Government and the cession by the Government to the State, both rest upon the survey of Bourne in 1820. (Rec. 30.)

These findings are embraced in the decree of the Circuit Court, which was wholly approved by the Supreme Court, which accepted but disregarded the facts found by the trial court.

The aforesaid Act of 1796 contains among other regulations one requiring the surveyor to note *all watercourses* over which the lines he runs shall pass and also the quality of the lands. It will be seen that there is no provision for noting or meandering bays, or for continuing section lines when a public bay is encountered. An inspection of the Bourne maps will disclose that he has followed the statute in running his lines when meeting a watercourse; that upon the maps, and in the field notes he has meandered Muddy Creek and Sandusky River. Looking first at the Ottawa county map, it will be seen he commenced at an elm in the southeast corner of Section 12. He then proceeded in a southwesterly direction, according to numbers placed thereon and re-

corded in his field notes, along the north side of Muddy Creek until he arrived at the west line of Section 27, where he has post No. 22. Then taking the Sandusky county map, it will be seen that he meandered Muddy Creek around until he came to post No. 23, on the north bank of Sandusky River, in Section 27; that he then proceeded along the north bank of Sandusky River until he got to the south section line of Section 32. We then get into a new township and the river is not shown, but it is taken up again on the south line of Section 32 and meandered to post 30; that his next post is on the south side of the river and on the south line of Section 32; that he then meandered the river on the south side until he got to post 37, on Sandusky Bay, in which vicinity the south channel of the river is lost in the waters of Sandusky Bay.

These meander lines and monuments are so exact and so clearly defined that the location of this river and creek cannot be doubted.

They had then and have now all the characteristics of watercourses—they are running streams. They have beds, banks and channels. They have a perceptible flow, while a bay has not.

Gould on Waters, Sec. 41.

The Government engineer found a navigable stream which he meandered, noted and platted, Sandusky River. He found a smaller non-navigable stream, which in this country is called a creek (1 N. Y., 107), and he meandered, noted and platted Muddy Creek.

He made no mention of any bay save Sandusky Bay, which is located *east of Eagle Island*, as shown upon his maps.

Thus plaintiff has title to lands bordering upon waters of the character of watercourses, which lands the Government caused to be surveyed and sold as bordering upon river and creek.

On September 28, 1850, Congress passed "An Act to Enable the State of Arkansas and Other States to Reclaim the Swamp Lands Within their Limits," in which "the whole of those swamp and *overflowed* lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State." (9 U. S. St. at Law, p. 519.)

It will be noted that this grant included not only swamp lands, which were unfit for cultivation, but also *overflowed lands*. Much of the land of plaintiff is this kind, the waters of Sandusky River, Muddy Creek and the several creeks flowing through its property having overflowed the lowlands contiguous to their channels. (Rec. 33.)

March 2, 1853, the legislature (51 Ohio Laws, p. 357) passed "An Act to Provide for draining and Reclaiming Swamp and Overflowed Lands Granted to the State of Ohio by Act of Congress, Approved September 28th, 1850."

The enacting clause shows that the sale of these lands was in compliance with the Government survey of 1820 aforesaid, viz:

> "Be it enacted by the General Assembly of the State of
> "Ohio, That within thirty days after the passage of this act, the
> "Auditor of State shall cause to be transmitted to the county
> "auditor of each county in which any of said swamp or over-

"flowed lands may be situated, a list of the same *by such de-*
"*scription, and in such divisions and subdivisions as reported*
"*by the Secretary of the Interior to the Governor of the State*
"*of Ohio.*"

Among other things the act provides (Sec. 7) it shall be the duty of the Governor to execute and deliver patents "for the lands therein described."

Thus clearly demonstrating that the lands were sold and patented by the State according to the description, divisions and subdivisions reported by the Secretary of the Interior to the Governor. These were made by Government Engineer Bourne in 1820.

We submit that Congress having been invested by the constitution with power of disposing of public lands and making needful rules and regulations respecting them, "whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, the question must be resolved by the laws of the United States." (13 Pet., 517.)

In *Cruse v. McCauley*, 96 Fed., 370, it is held:

"A patentee of public land over which a stream flows acquires all the rights in the waters of such stream possessed by the United States at the time the patent took effect."

In *Mitchell v. Smale*, 140 U. S., p. 413, it is said:

"All the legal consequences of such a boundary, (stream) in the matter of riparian rights and title to land under water, regularly follow."

As to the right of the Government to find and declare the mouth of Sandusky River, this Court has stated:

"The public, by the act of the proper officer, had a right to fix and declare the place of the river for the purpose of a survey and sale of the lands." * * * * * * * *

"The public had the option to declare the true mouth of the river, for the purposes of a survey and sale of the public land."

Bates v. Railroad Co., 1 Black, 204.

Defendants have no right to question the correctness of this survey or to claim that the waters are not those of Sandusky River and Muddy Creek, as surveyed.

Horne v. Smith, 159 U. S., 40.

We submit that the Government, having exercised its option and right, and having fixed and declared the mouths of Sandusky River at Eagle Island, and the mouth of Muddy Creek near Squaw Island, and declared that at that place it emptied into Sandusky River, and having meandered these waters as watercourses, and made plats and sold the lands as bordering upon Sandusky River and Muddy Creek, that neither the location or character of those streams can be changed by the State Courts so as to affect private rights acquired directly or indirectly from the Government.

As to the value and correctness of this Government survey and field notes, it has been held by Federal and State courts that the reports of deputy surveyors, contained in field notes and plats of this character,

have the force of depositions, and are conclusive upon the Government and all concerned as to that which is shown therein.

Beard v. Federy, 3 Wall., 478.
Stoneroad v. Stoneroad, 158 U. S., 240.
Russell v. Land Co., 158 U. S., 253.
R. R. Co. v. Walker, 47 Fed., 681.
Martin v. Hughes, 90 Fed., 632.
Brown v. Parker, 127 Mich., 390.
Tolleston Club v. State, 141 Ind., 197.
Sizor v. Logansport, 151 Ind., 626.
Shurmeier v. R. R., 10 Minn., 59.
Ellis v. Carey, 30 Ala., 725.
Rhodes v. Otis, 33 Ala., 578.
Lewis v. County, 77 Ala., 193.

In *Kirby v. Lewis*, 39 Fed., 75, it is said, in reference to a survey thus made under the Act of 1796:

"The value of the field notes as evidence was settled by the Supreme Court of the United States in the case of *U. S. v. Low*, 16 Pet., 166, where the court say: 'The official return of the Surveyor General has accorded to it the force of a deposition.' * * * They rank as the deposition of a surveyor, charged under oath with the duty of noting on the spot, at the time he makes the survey," etc.

There is no conflict in the testimony, for that of every witness on both sides who gave evidence upon the subject is the foundation upon which the aforesaid findings of fact rest.

In the absence of any conflict in the testimony, we assume we may call the attention of the court to a fraction of it, if for no other purpose than to show how fully it sustains the correctness of the Government survey.

Col. Smith, United States Engineer having control of the territory between Detroit River and Erie, Penna., for eight or nine years previous to date of trial, during which time the Government improved Sandusky River, and who has had personal acquaintance with the river during that time, testified (Rec. pp. 308-313) that a survey of Sandusky River was made by the Government in 1866 under the direction of Gen. Cram, for the purpose of locating the river from Fremont to Upper Sandusky Bay, and a map was made. (Copy is attached to record, marked "Plaintiff's Exhibit A.")

This map shows that the Government found Sandusky River empties into Sandusky Bay at the east end of Eagle Island, as plaintiff contends, and as the Government engineer found in 1820.

Col. Smith further said that from his acquaintance with Sandusky River, he knows it has a well-defined channel its entire length from Fremont to its mouth, which mouth is at a line drawn tangent on the east or northeast side of Eagle Island to the small headlands on the opposite side of the channel, as shown on the map. (Rec. 310-311.)

It is evident the character of the river has not changed since Bourne surveyed it in 1820, and that the United States still regards these waters Sandusky River. As such it maintains its supervision thereover.

Col. Bartlett, who has known these streams for upwards of fifty years (Rec. 58-59), stated that the river runs in a continuous channel until it reaches a point at the head of what is known as Eagle Island; that there the channel branches, one running off in a northeasterly direction and losing itself in Sandusky Bay at a point on a line between Eagle Island and Slade's Point; that the other or south branch runs off in a southeasterly direction and loses itself in the bay between the east end of Eagle Island and South Point; that it is navigable in its channel as far as Fremont.

He describes Muddy Creek from its source to the place where it empties into Sandusky River between Squaw Island and Winous Point. (Rec. 65-68.)

Mud Creek Bay, he says, is a local name given to the waters of Muddy Creek which have spread over the adjoining lowlands; that Muddy Creek runs through this so-called bay. (Rec. 68-69.)

Mackey (Rec. 105), Fitzgerald (Rec. 136-174), Jones (Rec. 201-209), French (Rec. 271-279), gave similar testimony.

Charles E. Dewitt, county surveyor of Ottawa county, witness for defendants, states that Sandusky River empties into Sandusky Bay at Eagle Island and Muddy Creek empties into Sandusky River, and that unaffected by the winds these streams carry off the waters coming from their sources and tributaries. (Rec. pp. 226-227-237-238-239-240-241.)

This evidence not only located Sandusky River and Muddy Creek as claimed by plaintiff, but it clearly demonstrates that these waters have all the characteristics of watercourses and not a single one of bays.

Gould on Waters, Sec. 41, defines a river:

"A running stream of water pent up on either side by banks, shores, or walls."

The Supreme Court of Ohio (3 Ohio, p. 498) says: "A river consists of water, bed and banks."

In 28 *Ency. of Law* (O. S.), p. 944, a watercourse is defined:

"A stream of water usually flowing in a definite channel having a bed and sides, or banks, and discharging itself into some other stream or body of water."

Angell on Watercourses, Sec. 4.
Woolrych on Waters, 40.
McMannus v. Carmichael, 3 Ia. 1.

"To constitute a watercourse, according to the ordinary signification of that term, there must be a stream usually flowing in a particular direction, and in a definite channel, and it must usually discharge itself into some other stream or body of water."

People v. Bridges, 142 Ill., 37.
Palmer v. Waddell, 22 Kas., 352.
Robinson v. Shank, 20 N. E. Rep., 713.

The evidence is in agreement that these waters have distinct beds, banks, channels and currents,—every element of watercourses. The current of the latter stream is distinct until it has passed Eagle Island and mingled with the still waters of Sandusky Bay. It is so strong

that it is perceptible for some distance after it empties into these still waters.

Attempt has been made to confine the river to the channel and to term a bay its waters which have overflowed the lowlands adjoining. But we submit the extent of the river is not limited to the channel.

The Sarah, 52 Fed., p. 235:

"The term 'channel' is properly applied to that portion of the bed of a river or canal which furnishes uninterruptedly through its course the deepest water."

As was said in *Johnson v. State*, 74 Ala., 537:

"There is a well recognized distinction between a river and a bay, the one being an inland stream and the other an inlet of the sea. Where the one begins and the other ends may often be a question of difficulty; yet the two are legally and essentially distinct."

A "bay" is defined to be

"An opening into the land where the water is shut in on all sides except at the entrance."

3 *Ency. of Law* (N. S.), 899.

U. S. v. Morel, 13 Am. Jur., 286.

Gould on Waters, Sec. 41, says a bay has no regular or perceptible flow.

Nor is there any thread of stream.

Sloan v. Biemiller, 34 O. S., p. 512.

So we have the fact that the waters which defendants claim to be those of a public bay have the character of watercourses, and not of bays. That they are confined between banks, have currents and channels; that there is a thread of stream, and the waters have a regular and perceptible flow into one direction, and are not shut in.

PLAINTIFF IS OWNER OF LANDS UNDER THE WATERS OF SANDUSKY RIVER AND MUDDY CREEK.

As early as 1828 the Supreme Court of Ohio recognized the Government surveys as binding upon the State, and then made a rule of property applicable to all cases where rivers are navigable and "*treated as such by the United States in selling the lands.*"

The decision was made in *Gazit v. Chambers*, 3 Ohio, 496, in settling a dispute about the ownership of the bed of Sandusky River not far from plaintiff's property, surveyed under authority of the Act of Congress of 1796. The court said (p. 497):

"It is, we conceive, vitally essential to the public peace, and to individual security, that there should be distinct and acknowledged legal owners for both the land and water of the country. * * * It cannot be reasonably doubted, that, if all the beds of our rivers supposed to be navigable, and treated as such by the United States, in selling the lands, are to be regarded as unappropriated territory, a door is opened for incalculable mischiefs. Intruders upon the common waste, would fall into endless broils among themselves, and involve the owners of the adjacent lands in controversies innumerable. Stones, soil, gravel,

the right to fish, would all be subject for individual scramble, necessarily leading to violence and outrage. The United States would be little interested in preserving either the peace or the property, and, indeed, would be powerless to do it, without an interference with the policy of the state, as unsuitable for the Union to exercise, as it would be inconvenient, if not dangerous to state sovereignty. * * * He who owns the lands upon both banks, owns the entire river, *subject only to the easement of navigation,* and he who owns upon the bank only, owns to the middle of the river, subject to the same easement."

We have cited decisions of the Supreme Court of Ohio showing this is and has been since 1828 a rule of property in Ohio. This rule will be observed by the Federal Courts.

In *St. Louis v. Rutz,* 138 U. S., 242, the court says that the question whether the fee of the riparian proprietor extends to the thread of the stream or only to the water's edge is one in regard to a rule of property which is governed by the local law of the state in which the property is situate.

In *Hardin v. Jordan,* 140 U. S., 371, it is said:

"Grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed, as to their effect, according to the law of the state in which the lands lie."

Barney v. Keokuk, 94 U. S., 324.
St. Louis v. Myers, 113 U. S., 566.
Packer v. Bird, 137 U. S., 661.

In *Shively v. Bowlby,* 152 U. S., 2, it is held:

"The title and rights of riparian or littoral proprietors in the soil below high water mark are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution."

We, therefore, submit that the effect of the grant of these lands by the United States bounded by these streams, according to the rule of property established in Ohio, was to give to plaintiff title to the entire streams, subject only to the easement of the public in Sandusky River for purposes of navigation. As Muddy Creek is not navigable, this title of plaintiff is also fortified by the act of Congress of 1796.

VI.

WHAT RIGHTS HAS THE PUBLIC IN SANDUSKY RIVER AND MUDDY CREEK.

It has been generally held that the public does not have a right of hunting in rivers wherein the owner of the banks owns the bed of the stream.

Toledo Liberal Shooting Co. vs. Erie Shooting Club, 90 Fed., 680.
Hall v. Alford, 114 Mich., 165.

The Supreme Court of Ohio has determined that the public has no right of hunting on the waters of Sandusky River.

State v. Shannon, 36 O. S., 423.

In *Bodi v. The Winous Point Shooting Club,* 57 O. S., 629, the Supreme Court decided that the public has not the right of hunting over the waters involved in this action. The Circuit Court had declared the public has not the right of hunting or fishing. The Supreme Court reversed the judgment as to fishing and affirmed it as to hunting.

In this action defendants originally claimed the right to hunt over the waters in dispute (Original Answer p. 328), but the Supreme Court having declared in the above case that the public could fish because the waters are public, but could not hunt because the waters are private, they withdrew their claim of right to hunt and filed an amended answer (Rec. p. 8) in which they only claim the right to fish. The right of hunting, therefore, is not involved herein.

We insist the only right of the public in any of these waters is navigation. In Muddy Creek and its overflow—Mud Creek Bay—there is not such right, as they are not navigable.

The statute of 1796 declares that *"navigable rivers"* shall be deemed to be and remain public highways, and they have been uniformly considered in Ohio to be nothing more than public highways over which the public has the easement of navigation for purposes of commerce.

In this connection, it will be noted that the Government did not denominate "Muddy Creek," a river. As no provision was made in the act that smaller streams, such as creeks, should be or remain highways, it was clearly not the intention of the Government to impose upon that creek the public easement of navigation. That creek does not have any of the elements of navigability, as defined by law.

In *Gazit v. Chambers,* 3 Ohio, 496, rivers are referred to as highways, burdened only with said easement. They are so termed in 23 O. S., 523, and other cases, but we think we need the support of no other case than *Pollock v. Cleveland Ship Building Co.,* 56 O. S., 655.

"The right of the public in the river," Birchard, J., says, in *Walker v. Public Works,* 16 Ohio, p. 544, "is merely the right to use the water *within the channel* for the purposes of navigation."

The only right being that of navigation, *ex necessitate rei,* the public is limited in the exercise of that right to *navigable waters.*

In *Wall v. Harbor Co.,* 152 Penna. St., 427, where coal barges were anchored in front of plaintiff's property, the court said:

"Defendant had a right of navigation over plaintiff's land * * * and when necessary to the exercise of that right, is might have made a temporary mooring; but, in any use which it made beyond that, it became a mere trespasser on the right of property. * * * It is immaterial that the company defendant did not inconvenience plaintiff's approach to the shore, or that she had in fact made no use of the property—for the company's right was of navigation alone, and its conduct was an invasion of plaintiff's right of property."

The legislature of Ohio has recognized the property rights of

riparian owners in Section 6881a. R. S., and therein provided for the punishment of any one who anchors a shanty-boat in a creek or river without the consent of the owner of the land.

The Supreme Court of Ohio (56 O. S., p. 655) has held that the mooring of boats over a person's land in a river unless engaged in navigation and commerce, is a wrong to such owner, to prohibit which an injunction will be granted.

Hence we submit the only right of the public in any of these waters is the right of navigation in Sandusky River; that it does not have any rights in Muddy Creek.

VII.

THE PUBLIC HAS NO RIGHT OF FISHING IN SANDUSKY RIVER OR MUDDY CREEK.

In Ohio navigable streams are as much the subject of private ownership as unnavigable ones.

State v. Shannon, 36 O. S., p. 428.

It is equally well settled that the only public waters in Ohio are Lake Erie, its estuaries and bays, and that in these only has existed the common right of fishing.

Sloan v. Biemiller, 34 O. S., 492.

The common right of fishery has at all times and in all places in this country and England been limited to public waters. The decisions of England have been uniformly to the effect that the owner of land bordering on waters which are not public, whether navigable or not, has the exclusive right of fishing in front of his land, to the middle of the stream.

Blackstone, in commenting upon the rights of the public in animals *ferae naturae*, says:

"But it follows from the very end and constitution of society, that the natural right as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community." (2 Bl. Com. 410.)

Fish are animals *ferae naturae* (142 Ill., 30); and in recognition of this right of restraint, it was declared in *Gavit v. Chambers*, 3 Ohio, p. 498, the right to fish in the streams in Ohio to be in the owner of the soil, to the end that numerous broils and controversies thereby be prevented.

The right of fishing and hunting is a boon and privilege granted either expressly or impliedly by the state (161 U. S., p. 533), and the state may withhold, qualify or restrict the right as in its judgment will best subserve the public welfare.

This having been the policy of Ohio, and it having made this rule of property with respect to its rivers, we submit that

"Riparian proprietors upon fresh water streams have the exclusive right of fishing in the water opposite their lands, and this right

extends to navigable fresh rivers as well as those which are unnavigable, where the soil of the former is held to be private property."

Gould on Waters, Sec. 182.

Angell on Tide Waters, 105.

In *Holyoke Co. v. Lyman*, 15 Wall., pp. 506, 512, it is said:

"Persons owning the whole of the soil constituting the bed and banks of the stream are entitled to the whole use and profits of the water opposite their land * * * as a fishery. * * *

Ownership of the banks and bed of the stream, as before remarked, gives to the proprietor the exclusive right of fishery, opposite his land."

In *Hooker v. Cummings*, 20 Johns. (N. Y.), 92, the court holds that if the soil on both sides be owned by an individual, he has the sole and exclusive right of fishing.

In *Trout & Salmon Club v. Mather*, 68 Vt., 342, the court says:

"Fresh rivers, of what kind soever, do of common right belong to the soil adjacent, so that the owners of the one side have, of common right, the proprietary of the soil, and consequently have the right of fishing *usque ad filum aquae;* and the owners of the other side the right of soil or ownership and fish unto the *filum aquae* on their side, and if a man be the owner of the land on both sides, in common presumption he is the owner of the whole river, and hath the right of fishing according to the extent of his land."

In *Beckman v. Kraemer*, 43 Ill., 447, quoting from *Washburn Law of Easements and Servitudes*, Sec. 411, it is said:

"By the common law, a right to take fish belongs so essentially to the right of soil in streams or bodies of water where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such streams, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to-wit, to the thread of the stream where he owns one side only. Within these limits, by common law, his right of fishery is sole and exclusive, unless restricted by some local law or well established usage of the state where the premises may be situated."

People v. Bridges, 142 Ill., 43.

Fuller v. Shedd, 161 Ill., 489.

If the public have no rights in those waters except navigation, it would seem clear that defendants, not having been engaged in navigation but in fishing, were there wrongfully.

It is also apparent that defendants to obtain the right of fishing in these waters must have the surveys of the United States set aside, and what was therein declared to be river and creek converted into a public bay or estuary of Lake Erie. This the Supreme Court of Ohio erred in doing.

VIII.

ARE DEFENDANTS ENGAGED IN NAVIGATION AND COMMERCE?

Defendants assert that they are engaged in commerce when catch-

ing fish in these waters, dumping them in small boats and rowing them to a neighboring city to sell, and that in so doing they are exercising the public right of navigation; that all of the waters in which they fish are navigable.

We are thus compelled to distinguish navigation and commerce from the acts of defendants, and the waters in which they desire to fish from navigable waters.

"Navigation is a term applied to the science or business of conducting vessels or materials over navigable waters."

Gerrish v. Brown, 51 Me., 262.

This, then, is the easement to which the waters are subject, and as that can only be carried on in navigable waters, clearly the public has no rights elsewhere. As is said in

Walker v. Public Works, 16 Ohio, p. 544:

"The right of the public is merely the right to use the water *within the channel for the purposes of navigation.*"

Yet, defendants claim the right to go outside of the channel, into all the shoal places, set their nets, catch the fish and load them upon boats drawing a few feet of water. They claim they are then engaged in commerce, and in navigation when they row or sail these boats away.

The Court, in *Pollock v. Shipbuilding Co.*, 56 O. S., p. 668, discusses the meaning of the term "easement of navigation."

"Clearly the term 'easement of navigation,' should not be construed in any narrow, scientific sense, but, having in mind that the reservation of the easement by the state is for the benefit of the public in its use of the highway, should receive a construction in harmony with the nature of the uses of the water by the public, and the objects of a public nature to be accomplished by such uses. Those objects relate to trade and commerce, which is the interchange of goods or products between nations or individuals by means of transportation. 'Commerce,' says Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat., 1, 'is traffic, but it is something more; it is intercourse.' Commerce, then, is the object; navigation the instrument or incident. In other words, navigation is the means by which commerce is accomplished, and it is for the purpose of aiding commerce that navigation is encouraged and protected. When the term 'easement of navigation' is used, therefore, it carries with it the idea of navigation for the purposes above expressed; so that, whatever relates to commerce, or is incident to it, is embraced in the term."

Also, *Groves v. Slaughter*, 15 Pet., 511.

"Commerce * * * * consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. * * * *

"The improvement of harbors, bays, and navigable rivers within the States * * * is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power."

County of Mobile v. Kimball, 102 U. S., 691, 699.

"Commerce * * * consists of intercourse and traffic between

citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities."

Gloucester v. Pennsylvania, 114 U. S., 203.

Welton v. Missouri, 91 U. S., 280.

We submit these defendants were not engaged in navigation and commerce, as comprehended by our laws and decisions.

IX.

WHAT ARE NAVIGABLE WATERS?

It is conceded that the channel of Sandusky River is navigable, but defendants claim all of the waters are navigable because they are capable of floating skiffs and flat-bottomed fishing boats.

Waters are navigable in law that are navigable in fact.

The Daniel Ball, 10 Wall., 563.

Packer v. Bird, 137 U. S., 667.

Reference to the evidence discloses that defendants were fishing in water but four feet deep (Rec. 149) and had their capstans in the soil under water but eight to ten inches deep. (Rec. 110.) They claim this was navigable water.

The testimony discloses that the waters which defendants claim to be navigable are from one inch to four feet deep (Rec. 100 to 108, 138, 192), and most of them much below a foot in depth; that at the place Muddy Creek empties into Sandusky River it is only three and a half to four feet deep in the channel. (Rec. 137.) The average depth in the so-called bay, outside of the channel of Sandusky River is three feet. (Rec. 115.)

All over these waters, except in the channel of Sandusky River, is a heavy growth of aquatic and lowland vegetation, in some place as "thick as the hair on a dog," and it is impossible to row through it. (Rec. 59, 67, 68, 132, 133, 137, 138, 141, 143, 163, 165.) Photographs attached to the record disclose the density of this vegetation in waters defendants claim to be navigable.

The Sandusky River is navigable in its channel as far up as Fremont—twenty-five miles from the mouths, but in all other places the only kind of craft that can sail are flat-bottomed boats drawing about a foot of water. (Rec. 144-145.) In many places they call a bay the vegetation is so thick that it is only boats drawing a few inches of water can get through, and then only by punting. (Rec. 60-67.) There never was any navigation outside of the channel of Sandusky River except with the flat-bottomed boats aforesaid.

The Court (Rec. 33 to 43) quite accurately describes these waters. In view of this evidence and these findings by the court, we maintain there is no navigable water outside of the channel of Sandusky River, because

"In this country, waters, to be navigable in law, must be capable of navigation in fact *as highways for the transportation of commerce.*

A bay or arm of one of the Great Lakes, some 4,000 acres in extent, which was patented to the state as swamp land, and which, though of sufficient depth for navigation where it opens into the lake, is throughout the remainder of its extent of an average depth of not more than two feet, and rarely more than three feet, and is covered through the summer with grass and rushes, is not navigable water, but merely a marsh, and subject to private ownership."

Toledo Liberal Shooting Co. v. Erie Shooting Club, 90 Fed., 682.

Judge Lurton says:

"None of the characteristics of commercial navigability are shown here. It is the natural feeding ground of the duck and other water fowl. In their pursuit by canoe and flat-bottomed ducking boats the water may be navigated. That is not commerce, and proves nothing. The same test would convert every pond and swamp capable of floating a boat into a navigable stream or lake. This bay is not a highway, never has been, and can never be. At the common law the term 'navigable' had a technical meaning, and was applied to all streams or bodies of water in which the tide ebbed and flowed. All such waters were public. That definition is not applicable in this country, and all waters are held navigable in law, and subject to a public use, which are by their character capable of use as highways, for purposes useful to trade or agriculture. It is the capability of being navigated for useful purposes, which is the test."

In *The Montello*, 20 Wall., 439, Judge Davis says:

"They are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. * * * * *

"If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'" (441-442.)

Same declaration in

Rowe v. Bridge Corporation, 21 Pick., 247.

Hubbard v. Bell, 54 Ill., 119.

"Although this pond is inherently capable of floating a fishing skiff

or a gunning canoe, no claim is made that it is inherently capable of use to any extent beneficial to trade or agriculture."

New England Trout Club v. Mather, 68 Vt., 338.

In *Hickok v. Hine*, 23 O. S., 523, it is held:

"A river is regarded navigable which is capable of transporting the products of the country, or upon which commerce may be conducted; and its character as a highway is determined by its navigable capacity rather than by the frequency of its use for navigation."

These tests of navigability are also applied in

The Genesee Chief, 12 How., 443.
Barney v. Keokuk, 94 U. S., 324.
Packer v. Bird, 137 U. S., 661.
Shively v. Bowlby, 152 U. S., 1.
Gould on Waters, Sec. 54.

"To be navigable it must be of actual or practical utility to the public as a channel of trade."

Lewis v. County, 77 Ala., 193.
Boyzer v. McMillan, 105 Ala., 395.

In *Chisholm v. Caines*, 67 Fed., 285, it is held:

"In determining whether streams and arms of the sea traversing marsh lands are public, navigable waters, the test is whether they are, or are capable of becoming, public highways; that is, a means, open to the public, of passing from one place, where they have a right to be, to another, in which they have the same right. In other words, there must be a public terminus at each end, and hence partially navigable creeks which open upon a bay, but lead merely into private lands, are not public, navigable water."

We submit that the waters outside of the channel of the Sandusky River have no element of navigability; that they are not, never have been and cannot become a highway for the transportation of commerce.

They are too shallow to support watercraft upon which products can be transported, and are only capable of carrying flat-bottomed duck boats, fishing boats and row boats drawing a few inches of water, and are no more navigable than hundreds of creeks running through meadows in all parts of the country, which it would be absurd to call navigable streams in a legal sense.

Further, from the latter part of May to the latter part of October, the waters are covered with a dense mass of lowland and aquatic vegetation, so thick in most places that even small boats of the kind above mentioned cannot be propelled over them except by the laborious method of punting. And from early November until April they are covered with ice so thick that in many places it freezes to the bottom, and in all places makes navigation impossible. So that at best it is only for a few months in the year that these small boats can be propelled at all in these shallow waters except by placing a pole or oar on the bottom and pushing them along.

Under these circumstances, to state that they are of actual or

practical utility to the public as a channel of trade is to ignore and disregard every decision ever made defining "navigable waters."

Nor can the waters outside of the channel of the river be made highways, for persons cannot pass from one point to another thereover. The Circuit Court found that Mud Creek Bay was west of a line drawn from Winous Point to Squaw Island. Those waters are entirely surrounded by the lands of plaintiff, so that as declared in 67 Fed., 296, and 28 Ind., 267, *supra*, there can be no highway upon which commerce can be carried on, because there is no outlet after entering upon them, and no place to land and trade except upon the land of plaintiff.

In view of these authorities and the facts in this case, we submit that the only navigable waters within the territory described are those of the channel of the Sandusky River, in which the public has no right of fishing.

THE JUDGMENT IS IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES, IN THAT IT DEPRIVES PLAINTIFF OF LANDS SURVEYED, PLATTED AND SOLD AS BORDERING UPON SANDUSKY RIVER AND MUDDY CREEK, WITHOUT DUE PROCESS OF LAW AND JUST COMPENSATION.

Congress was given power by the Constitution (Article 4, Sec. 3) to dispose of the public lands, and to make needful rules and regulations respecting them. These surveys and plats were made in conformance to those rules and regulations. And in the many cases above cited it was held that the surveys and plats were binding upon the Government and all concerned.

The Supreme Court of Ohio long ago conceded that the Government has the right to survey, plat and patent to individuals the lands in question as bordering upon river and creek, and declared those patents should be so construed as to give effect to their true intent and meaning. *James v. Howell*, 41 O S., 707.

In this connection, we do not feel called upon to support by authority the statement that the security of titles and the public peace require that confidence should be reposed in the action and records of officials acting within the scope of the jurisdiction conferred upon them by law, and that the patent issued by the Government is the final record of the judgment of those public officers to whom alone has been committed the jurisdiction to ascertain and determine the matters set forth in the surveys and plats, as well as the patents.

It has, however, been decided that

"When lands are granted according to an official plat of their survey, the plat, with its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and, so

far as limits are concerned, controls as much as if such descriptive features were written out on the face of the deed or grant."

Cragin v. Powell, 128 U. S., 691.

In the above case, the contention was that the patents did not recite that the lands bordered upon a bayou. The court, in using the above language, calls attention to the fact that it was the duty of the surveyor to note all watercourses over which the line he runs may pass, etc. (Secs. 2395-2396 R. S.); and having done so the survey, plat with its field-notes, etc., became part of the grant though no descriptive features of the character of the land were contained in the patent.

In *Heath v. Wallace*, 138 U. S., 585, where the character of the land was in question, the court said:

"It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that (land) department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country. * * * We are of the opinion, therefore, that the decision of the land department on a question of the actual physical character of certain lands is not subject to review by the courts."

In *Knight v. Association*, 142 U. S., 176, it is said:

"It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the Government, and that the action of that department, within the scope of its authority, is unassailable in the court except by direct proceeding."

Mr. Justice Fields also says that if this record of the Government could be denied and controverted, "the patent would fail to be, as it was intended it should be, an instrument of quiet security to its possessors," and would introduce endless confusion and perplexity.

In *French v. Fyan*, 93 U. S., p. 172, it is said:

"It would be substituting the jury or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

To the same effect is

Steel v. Smelting Co., 106 U. S., 447.
Fussell v. Gregg, 113 U. S., 550.
Wright v. Roseberry, 121 U. S., 505.
Noble v. Railroad, 147 U. S., 174.
Chandler v. Mining Co., 149 U. S., 79.

Unless the location of the lands, the nature and character thereof and of waters upon which they border, as found by the Government, be conclusive upon it and all concerned, and upon the courts of the country, no citizen could have or give any assurance of the extent of his ownership. And this case affords a most apt illustration of the insecurity of title if the physical character of the land and waters and

the matters of fact found by the Government (which, as we have seen, control as much as if it had been set out in the patents that the waters were those of Sandusky River and Muddy Creek, 128 U. S., 691, *supra*), could be made a subject of review by any court of the State, in a collateral proceeding, upon contestation by mere intruders without any title or claims of title.

The result might be in any case to render null the power given Congress by the Constitution to make rules and regulations for the sale of the public lands. No grant would be secure to the citizen. The land he had bought as adjacent to a watercourse, the ownership of which invested him with the rights of a riparian proprietor to the thread of the stream, migh be declared by the courts of a State to be adjacent to an open bay, and the owner deprived without compensation of his riparian rights.

If courts may disregard the action and grants of the Government, why may not the legislature also do so? And in this age public clamor may do much to deprive the citizen of his property unless he is fully protected in his guaranteed constitutional rights. For the reason that neither courts nor legislature may deprive a citizen of his property rights without due process of law and without compensation, and that he may be secure in his title and in all the rights vested in him thereby, it has been the uniform holding of the courts of the land that the facts recorded in the Land Office of the Government, and upon which grants are made, shall not be reviewed except for fraud or mistake.

Hence, we submit, that these waters cannot now be held to be those of an open bay, without a review and setting aside of the facts so recorded in survey, plat, field-notes and grant, and the taking of plaintiff's property rights without due process of law and just compensation.

The rule of property in Ohio, that the owner of lands on both sides of a river or creek whether navigable or unnavigable, owns the bed of the stream, and is entitled to every beneficial use and enjoyment thereof, including the sole right of fishing and hunting therein and thereover, has been declared in several cases by the Supreme Court of Ohio in determining the rights of persons owning land along the Sandusky River, conveyed by the Government under the very act in which the survey and sale of the property owned by the plaintiff was authorized.

Gavit v. Chambers, 3 Ohio, 496.
June v. Purcell, 36 O. S., 396.
State v. Shannon, 36 O. S., 423.

We maintain that the rights thus acquired by plaintiff cannot be taken away or plaintiff divested thereof without due process of law and just compensation to plaintiff therefor.

Kaukauna Co. v. Green Bay Co., 142 U. S. 254.

As early as *Walker v. Public Works*, 16 Ohio 540, the court held:

"The legislature cannot, by declaring a river navigable which is

not so in fact, deprive the riparian proprietors of their rights to the use of the water for hydraulic and other purposes, without rendering them compensation."

Birchard, C. J., said, in rendering the opinion:

"He who owns the land on both banks of such river, owns the entire river, subject only to the easement of navigation, and he who owns the land upon one bank only, owns to the middle of the main channel, subject to the same easement. The right of the public is merely the right to use the water within the channel for the purposes of navigation. The proprietor of the lands upon its banks may use the waters of the river in any way not inconsistent with the public easement, or of private rights, and neither the State nor any individual has the right to divert the water to his injury. The right of the adjacent proprietor to the water of the stream is an usufructory right, appurtenant to the freehold, not an absolute property. Hence the State in its exercise of the right of eminent domain can subject the waters of such stream to other public uses the same as any other private property, *by making a just compensation for the injury, and not otherwise.*

* * * * * * * * * * * * *

"A right of this description is a right of property within the protection of the Constitution, and that cannot be impaired by a legislative enactment which provides no compensation to the proprietor for the injury."

The court then declares that the legislature has no power to change the private rights of the riparian proprietor.

In *Day v. Railway*, 44 O. S., 419, the court quotes with approval much of the foregoing, and says:

"To disturb the rule now would be a dangerous tampering with private rights."

It is said in Railroad v. Platt, 53 O. S., 265-267, that riparian rights are of a permanent character.

We submit that neither the legislature nor judiciary has powet to declare navigable those waters which are not navigable, or to declare waters to be those of an open bay which at the time of the sale by the Government and the state and the purchase by the plaintiff had been surveyed and platted by the Government as bordering upon the Sandusky River and Muddy Creek.

Further, we submit that not only by the rule of property established in Ohio in regard to the riparian rights of those persons having lands upon navigable streams, did plaintiff acquire rights of which it cannot be deprived by judicial decree without just compensation, but the federal statute (Sec. 2476, Rev. Stat.) expressly conferred upon plaintiff the ownership of the bed of Muddy Creek, in which defendants are now claiming public rights.

Muddy Creek never was and never can be navigable in a legal sense. Bourne did not so find it, and the Government has never regarded it navigable.

Hence, we submit, by the patents of the United States, plaintiff's predecessors in title to lands bordering upon the creek, became pro-

prietors of the bed, and plaintiff is the owner thereof without any aid from the property rule in Ohio.

Sandusky River being navigable, with the aid of this rule of property, it has ownership of the bed, with the riparian rights of exclusive fishing and hunting. Nor does the size of the river at its mouth diminish those rights or impair them. "To hold that it did," says the court in *Jones v. Soulaud*, 24 How., p. 65, "would be a dangerous tampering with riparian rights, involving litigation concerning the size of rivers as matter of fact, rather than proceeding on established principles."

The court will note that while the right of fishing was the only right asserted by defendants, that the Supreme Court of Ohio has by its judgment deprived plaintiff of its lands by declaring that these waters are of a public bay. But it is also true that to deprive it of its exclusive right of fishing is to deprive it of property within the meaning of the State and Federal Constitutions.

In *Callen v. Electric Light Co.*, 66 O. S., 176-177, the court says that the word "property," as used in the bill of rights of Ohio, for the taking of which just compensation shall be made, denotes

"Certain rights in things which pertain to persons and which are created and sanctioned by law. They are, the right of user, the right of exclusion and the right of disposition, * * * and include every valuable interest which can be enjoyed as property and recognized as such. * * * * * * * *

"The constitutional provisions of the United States and of the several states which declare that private property shall not be taken for public use without just compensation, were intended to establish this principle beyond legislative control. It is not necessary that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such a serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution."

"This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

Yates v. Milwaukee, 10 Wall., 504.
Pumpelly v. Green Bay Co., 13 Wall., 166.

This the State Courts have also uniformly held.

Shedd v. Fuller, 161 Ill., 462.
Clark v. Improvement Co., 45 Neb., 799.
People v. Platt, 17 Johns., 195.
Morgan v. Kirby, 18 Barb., 277.
Hall v. Alford, 114 Mich., 165.
Grand Rapids v. Powers, 89 Mich., 116.
Bell v. Gough, 3 Zabr., 624.

Water Co. v. Raff, 36 N. J. L., 335.
Norfolk v. Cooke, 27 Gratt., 430.
Munroe v. Ivie, 2 Utah, 535.
Pomeroy on Riparian Rights, Sec. 159.

The Supreme Court of Ohio has declared the legislature cannot thus deprive citizens of these rights without due process of law and just compensation. No more can the courts, as the requirements of Federal Constitution extend to judicial as well as to legislative action of States.

Scott v. McNeal, 154 U. S., 34.
C. B. & Q. R. v. Chicago, 166 U. S., 226.
Blake v. McClung, 172 U. S., 260.

The Constitution of the United States stands between plaintiff and this judicial decision, which deprives it of its property, and upon its protection plaintiff may rely, particularly as its assurance of good title was given by the surveys and patents of the United States. The judgment of the Supreme Court of Ohio is all the harder to bear because it is not supported by a syllable or scintilla of evidence, but is contrary to all the testimony and the finding of facts by the Court.

If this Honorable Court take the views we have expressed as correct, there may be no necessity, in view of the findings of fact of the Court with reference to the title of plaintiff and the Government surveys, to discuss the questions raised by defendants, but in a proper presentation of the case it becomes our duty to meet those questions made in the State Court and which doubtless will be made here.

XI.

EFFECT UPON THE GRANTS OF THE MEANDER LINES ALONG SANDUSKY RIVER AND MUDDY CREEK AND THE MAKING OF SOME SECTIONS FRACTIONAL.

The law of 1796 provided that the sections should contain 640 acres as near as possible, and that fractions of sections should also be noted, when the making of full sections was interfered with by the course of navigable rivers. By the act of 1805 the acreage in these fractional sections was to be returned.

The government surveyor designated some of the sections fractional which border upon Sandusky River.

Defendants contend that as the surveyor returned some sections as fractional and as they were subsequently sold and conveyed as such, the grant did not convey any title beyond the meander lines.

Plaintiff contends:

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuousities of the banks of the stream, and as the means of ascertaining the quantity of land in

the fraction subject to sale, and which is to be paid for by the purchaser.

"In preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the watercourse, and not the meander line, as actually run on the land, is the boundary."

Railroad v. Shurmeir, 7 Wall., 287.

The Supreme Court of Ohio has adopted the above language.

June v. Purcell, 36 O. S. 396.
James v. Howell, 41 O. S. 696.

The case has been uniformly followed;

Hardin v. Jordan, 140 U. S., 371.
Land Co. v. Jeffries, 40 Fed., 386.
Palmer v. Dodd, 64 Mich., 474.
Fuller v. Dauphin, 124 Ill., 544.
Ladd v. Osborne, 79 Iowa, 93.
Sphung v. Moore, 120 Ind., 352.
Knudsen v. Omanson, 10 Utah, 124.
Lamprey v. State, 52 Minn., 181.
Freeman v. Bellgarde, 108 Cal., 179.
Sizor v. Logansport, 151 Ind., 626.
Land Co. v. Bigelow, 84 Wis., 157.
Ridgeway v. Ludlow, 58 Ind., 248.

In *Tolleston Club of Chicago v. State*, 141 Ind., 197, the Court holds:

Meander lines are not boundary lines; and where land is conveyed by a governmental division, the whole division, both within and without the meander lines drawn in the original plat—the wet land as well as the dry—passes with the deed; and the fact that the Government's patent specifies the land conveyed as a fractional part of such a division, naming the number of acres, does not change the rule as to the quantity of land conveyed, for the quantity thus named refers to the fact that that division contains only that number of acres of dry land. Where, in such a case, the dry land without the meander is divided into lots by the meander, a patent from the state for one of its lots, describing it by its number and section, conveys the whole of such lot to the opposite section line.

"The description and plat of the original Government survey, filed in the general land office, as made by the Surveyor General from the field-notes, are conclusive; and the section lines and corners, as laid down in the description and plat, are binding upon the general government and upon all other parties concerned."

In deciding this case, the Court said:

"Duly certified copies of the field-notes and plat of the original survey, as well as of the list and description of the lands, as filed in the general land office, were in evidence. Such description and plat, as made by the Surveyor General from the field-notes, are conclusive; and the section lines and corners, as laid down in the description and

plat, are binding upon the general government and upon all other parties concerned.

* * * * * * * * * * * *

"As frequently decided, meander lines are not boundary lines, unless expressly made so in the instrument of conveyance. The full title of the grantor to the whole section or other division named, both within and without the meander line, the wet land as well as the dry, passes with the deed."

* * * * * * * * * * * *

"The term fractional, as applied to the sections named in the patent, refers simply to the circumstance that they do not contain 640 acres each of dry land. As we have seen, however, the sections were fully surveyed; the corners and boundary lines were determined and recorded in each instance. It follows, from what we have already said, and from the authorities above cited, that the conveyance of the fractional sections carried title to the extreme boundary lines of the sections. All was conveyed. There remained to the United States neither upland nor lowland, whether exposed to the surface *or covered by the waters of the marsh or the river.* The state took to the section lines."

In making decision upon the petition for rehearing, the Court said:

"Even, therefore, if the land had not been fully surveyed, and the section lines and corners were not all determined, as urged by counsel for appellee; and even if the survey terminated on the banks or edge of the morass on each side of the river, still the parties purchasing the lots abutting upon this morass, or the meander line, would take to the middle or thread of the stream. *Nor can reservations be implied, in case of conveyances of lands along streams. When, therefore, the Government has surveyed its lands along the bank of a stream, and has sold and conveyed such lands by governmental subdivisions, its patent conveys the title to all islands lying between the meander lines and the middle thread of the river,* unless previous to such patent it has surveyed such islands as governmental subdivisions, or expressly reserved them when not surveyed.'

"*Nor will it do, especially in view of the foregoing authorities, for counsel to say that the meanders in the case before us are not meanders of the river.* The field-notes show that the whole territory between the meander lines was covered with water; while the evidence shows that it is still so covered. The river, so-called, was the central or flowing part of this body of water. Meander lines, from their very nature, being intended to mark the sinuousities of a stream, are run as close to the water as can conveniently be done by the surveyors.

* * * * * * * * * * * *

"*In addition to this, the field-notes actually name the lines as meanders of the river, the language used being, 'Meanders of Calumic River.'*

"The meander is, therefore, merely a mark for the line of the river, being laid off as near to the river bank as the surveyors could work. It means the river, and is not itself a boundary, but only indicates the location of the true boundary, which is the river itself."

We have quoted much of the language of the above case because the court has made such a thorough examination of, and given such an exhaustive opinion upon, the effect to be given the Government surveys and plats in and upon which waters have been located and described as watercourses, when the rights of persons who have subsequently acquired title to lands bordering thereon have been brought into question.

In *Banks v. Ogden*, 2 Wall., 68, it is said:

"It is a familiar principle of law, that a grant of land bordering on a road or river, carries the title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines."

Followed in *Paine v. Consumers Co.*, 71 Fed., 629.

It is said in *Hardin v. Jordan*, 140 U. S., 381:

"It has never been held that lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees."

In *Middleton v. Pritchard*, 4 Ill., 510, it is said:

"Where the Government makes a grant, and does not reserve any right or interest that could pass by the grant, the grant must be intended to include all that might pass by it."

The principle "that whenever the question in any court, state or federal is, whether a title to land which had been once the property of the United States has passed, that question must be resolved by the laws of the United States," has been recognized many times.

Wilcox v. Jackson, 13 Pet., 517.
Railroad v. Land Co., 71 Wis., 99.
Whitney v. Lumber Co., 78 Wis. 240.

And the decisions above cited have been fully approved in

Jefferis v. Land Co., 134 U. S., 196.

In view of these authorities, we submit that the claim made by defendants that plaintiff is limited in its ownership to the land included within the fractional sections, because of the meander lines along Muddy Creek and the Sandusky River, is not founded upon law or reason.

XII.

THE DIFFERENCE IN EXTENT OF WATERS SINCE GOVERNMENT SURVEY OF 1820 DOES NOT CHANGE THEIR CHARACTER.

Defendants contend that although these waters were surveyed as river and creek, they have ceased to be such and have become a bay because the destruction of the banks and the overflowing of the lowlands has given them greater width and changed their form.

We submit that a watercourse does not become a bay because its waters spread over the lowlands adjacent.

Gravel Road Co. v. Harvey, 90 Ind., 192.
Munkres v. K. C. R. R., 72 Mo., 514.
Pyle v. Richards, 17 Neb., 182.
Case v. Hoffman, 84 Wis., 438.
French v. Carhart, 1 N. Y., 107.

The court finds that the current of Muddy Creek is perceptible through what is locally called Mud Creek Bay; that the waters of this creek have overflowed the lowlands and thereby broadened the waters, which, however, narrow down just before the creek empties into the river; that after entering the river they flow in the well-defined current of the river until they have passed Eagle Island. (Rec. p. 43.)

In *Mitchell v. Bain*, 142 Ind., 604, it is said:

"A stream does not cease to be a watercourse, because at certain points it spreads over low ground several rods in width and flows for a distance without a defined channel or banks before flowing again in a definite channel. * * * If a watercourse is lost in a swamp or lake it is still a watercourse, if it emerges therefrom in a well defined channel."

"That the banks of a stream are not everywhere clearly and sharply defined is not controlling. The character of the country through which the stream flows must be taken into account. Where the country is hilly and rolling, the fall rapid and the soil easily cut and washed, there will in general be a well marked channel. Where, however, the country is flat, the fall slight, and the soil turfy and full of roots and strong grass, there the channel will often be shallow and the sides in many places not sharply defined."

It was said in *Macomber v. Godfrey*, 108 Mass., 219, the mere fact that the water of a stream spreads over a wide surface without apparent banks, because of the level character of the land, does not deprive it of the character of a watercourse, provided it usually flows in a continuous current.

In *Rigney v. Tacoma Light & Water Co.*, 9 Wash., 578, it was held:

"The fact that a stream widens into a marsh or a swamp will not deprive it of its character as a natural watercourse, if it continues its current through the swamp and finally emerges therefrom in a well defined channel."

In the opinion, the court says:

"In a leading and well considered case in Wisconsin, the Supreme Court of that state held that the fact that a stream spreads over wide reaches of marshes and swamps, on or below the surface, did not militate against its being a watercourse in every essential particular so long as it could be identified as the same stream. And the identity of the stream through the marshes and swamps was in that case disclosed solely by its current, there being no defined channel or channels whatever."

Case v. Hoffman, 84 Wis., 438.

"The different channels or creeks separating and flowing around intervening islands in the stream, though, in local usage, receiving different names, are a part of 'the river,' not less than the main channel itself."

Schermerhorn v. H. R. R. R., 38 N. Y., 103.

"The waters of Sandusky River and Muddy Creek are not only identified by their channels and currents, but also by their old banks which have become submerged and are now covered with aquatic and lowland vegetation.

We submit that the erosion and wearing away of the low banks and the consequent widening of the streams by the creation of shallows between their channels and banks has not changed them from river and creek to a bay.

XIII.

CALLING THE WATERS A BAY DOES NOT MAKE THEM ONE.

Defendant also asserts that the waters are to be considered those of a bay because at the place where Muddy Creek has broadened over the lowlands it is locally known as "Mud Creek Bay."

It is held in *State v. Gilmanton*, 14 N. H., 467:

"In general, if in a body of water there be a steady uniform current, it will be a river."

The court says (477):

"The name cannot alter the thing; it cannot be received as a proper definition of the character of the water. This may be called Sanborton Bay or the Straits of Gibraltar, but still it may be a river. Sanborton Bay is a local appellation, which conveniently enough points out the particular water of which a person may be speaking; but this water is clearly not a bay and cannot be called so with any attention to geographical correctness. A bay is a bending or curving of the shore of the sea or a lake. * * * As a matter of convenience, we may apply to water that name to which custom has familiarized us; but when it becomes necessary to determine what a particular body of water actually is, we cannot disregard the etymology of the term used to designate it."

Hence, we submit, the fact that part of the waters are locally known as "Mud Creek Bay" can have no weight in this controversy.

The evidence, however, is without conflict that the waters *east of Squaw Island* were never even locally known as "Mud Creek Bay."

XIV.

THE RISE AND FALL OF THE WATERS.

In common with all watercourses flowing into the Great Lakes and their estuaries at a general level, these waters rise and fall with those of Lake Erie and Sandusky Bay *when the latter are affected by the winds.*

From this fact defendants claim the waters are those of a public bay connected with Sandusky Bay.

It is not disputed that there is a current in these waters which carries them into Sandusky Bay, when unaffected by the wind; that the waters of Sandusky River, as far as Fremont, *twenty-five miles from its mouths,* rise and fall with those of Lake Erie and Sandusky Bay when affected by the wind. With these facts, it is difficult to see anything of reason in defendant's contention, for if waters conceded to be those of Sandusky River rise and fall, the fact that waters nearer Sandusky Bay rise and fall likewise does not tend to prove they are not waters of the river.

The question raised is fully answered in *Knight v. Association*, 142 U. S., 176, in which Mr. Justice Field (p. 207) said:

"In addition to this fact it may be observed that at the time the Circuit Court was not ignorant of the universal rule governing the measurement of waters, to which the Supreme Court of the state makes no reference in its decision, and of which it seems to have been entirely oblivious, that where a water of a larger dimension is intersected by a water of a smaller dimension, the line of measurement of the first crosses the latter at the points of junction, from headland to headland. The existence of tide lands in the intersecting water in no respect affects the result. For illustration, in the measurement of a body of water like Long Island Sound, when the Connecticut River is met the line of survey does not follow up that river to Hartford because the tide is felt at that place, but it crosses the mouth of the river from headland to headland. So, too, the measurement of Chesapeake Bay does not include the Potomac River up to Washington because the tide is felt at the site of the capital. It would be absurd to include in the measurement of the bay of San Francisco the waters of the river Sacramento as far as the city of that name, nearly a hundred miles above the bay, because the tide is felt there, or to embrace the river San Joaquin as far as Stockton because the tide reaches to that place. This is so plain that is excites surprise that any question should have been made upon the subject. And if a river extending a hundred miles or more could not be included in the bay, even though affected by the tides, neither can a stream of less dimensions, though not exceeding over one or two miles."

In *Hooker v. Cummings*, 20 Johns. (N.Y.), 90, it was contended that the Salmon River was public because in it the waters rose and fell with those of Lake Ontario, yet the court held that fact did not change the character of the river.

Nor does the rise and fall of the waters with Sandusky Bay destroy their private character and impress upon them a public one. This rise and fall occurred in waters decided to be private in

Fuller v. Shedd, 161 Ill., p. 472.

In *Rice v. Ruddiman*, 10 Mich., 138, Judge Christiancy, in passing upon the question whether certain waters were to be treated as the widening of Muskegon River or an arm or estuary of Lake Michigan, said:

"The only circumstance which I have been able to discover, tending to give it the character of the latter, is the fact that it rises and falls with it. If this fact were sufficient to make it a part of Lake Michigan, then it is difficult to see why every other stream, large or small, which empties into that lake, should not be considered part of it so far up as as it is affected by the rise and fall of the lake. The rise and fall of Lake Michigan, and the other great lakes of the same chain, is not a tide occurring at regular intervals, like that of the ocean, nor does it rise from the same cause. And though it is probable their waters may be slightly affected by lunar attraction, and a very minute tide may perhaps be detected by a long and careful course of observation with accurate instruments; yet the court must judicially notice that it must be too slight to be recognized by ordinary observation, or to serve any practical purpose in determining the extent of riparian ownership. This fact was judicially noticed in *Lorman v. Benson*, 8 Mich., 18. Courts must also be presumed to be so far acquainted with the laws of nature as to enable them judicially to determine that the rise and fall of these lakes are governed mainly by the same causes which affect the rise and fall of the rivers which flow into them, and which rise and fall more than the lakes themselevs; and that all the connecting straits between the lakes, such as the straits of Ste. Mary (or Ste. Mary's River), the St. Clair and Detroit Rivers, must, of necessity, rise and fall with the lakes which they connect."

So we submit that the fact that the waters or rivers flowing into Lake Erie and the large bays which are estuaries thereof, and having their mouths at a general level with those of the larger bodies of water into which they empty, rise and fall with the larger bodies consequent upon the action of the wind, does not convert them into bays, or make them public, as claimed by defendants.

In this case the Circuit Court (Rec. 44) states that the cause of this rise and fall is the wind in its action upon the waters; that when it is from the southwest the waters fall, and when it is from the northeast the waters back up; that "*when there are no disturbing causes the waters flow in the channel sufficiently to carry off the waters coming down the river.*"

XV.

THE CLAIM THAT THE PUBLIC FISHED A LONG TIME IN THESE WATERS.

This claim is made in the answer. There is no evidence to support it and the court does not so find.

"But the custom proposed to be proved is not one that could be sustained by law, even if especially pleaded; for a custom to take anything from another's land, or for a profit *a prendre*, is not a lawful custom."

Waters v. Lilley, 4 Pick., 148.

McFarlin v. Essex Co., 64 Mass., 310.

"The fact that for many years the public have gone on creeks traversing private lands, without hindrance, does not create any right."

Chisholm v. Caines, 67 Fed., 285.

Moulton v. Lilly, 37 Me., 493.

In *Cobb v. Davenport*, 32 N. J. L., pages 387, 389, the court says such a claim would be monstrous.

"The right of fishing being a profit *a prendre*, in another's soil, as distinguished by an easement, cannot be claimed by custom."

We submit, therefore, there is no element of legal right in any such claim, even if there were any evidence to support the allegation of their answer, which there is not.

XVI.

CONCLUSION.

The result of the decision of the Supreme Court has been to dispossess plaintiff of property, much of which has been in its possession for fifty years or more, and opening to the public lands and waters which upon the finding of facts by the courts, belong to plaintiff, and upon which it has expended thousands of dollars to improve and protect.

The judgment of the Supreme Court of Ohio we can, with great respect for that court, say was arbitrarily made, in disregard of the facts found, and the injustice of the decision is particularly hard to bear in view of the findings by the court—that as matter of fact the waters are those of Sandusky River and Muddy Creek, but, as matter of law, they are not.

We are not asking this court to consider any other facts than those found by the courts of Ohio. We are asking this Court to reverse the judgment of the Supreme Court of Ohio because that court has ignored the facts found; because it has disregarded the surveys and patents of the United States, which this Court has said repeatedly are binding upon the State courts; because it has denied the title and rights of plaintiff acquired under statutes of the United States; because it has taken from plaintiff, without due process of law and without compensation, a large area of property and opened it to the public for public use, in contravention of those provisions of the Constitution of the United States which prohibit such action. For these reasons we pray the Court to issue such mandate as will protect plaintiff in the enjoyment of property acquired under the Acts of Congress of the United States, its surveys, plats and patents.

Respectfully submitted,

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